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No. 89-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

MAJOR F. BOGGERTY and ADEN BOGGERTY,

Petitioners,

v

EARNESTINE WILSON, JACKIE VEASLEY, CYNTHIA MARTIN, DAVID MURRAY, LT. WARREN COLEMAN,

Respondents,

and

THE CITY OF DETROIT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

WAS THE JURY VERDICT IMPOSING MUNICIPAL LIABILITY UNDER 42 USC § 1983 PROPERLY REVERSED WHERE NEITHER THE PLEADINGS NOR THE EVIDENCE PRODUCED AT TRIAL SUPPORTED A FINDING OF A CITY POLICY OF INADEQUATE TRAINING WHICH WAS CAUSALLY RELATED TO A CONSTITUTIONAL DEPRIVATION?

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The Respondent, City of Detroit, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Michigan Court of Appeals' opinion in this case.

OPINION BELOW

The opinion of the Michigan Court of Appeals is reported at 160 Mich App 514; 408 NW2d 809 (1987). Leave to appeal was denied by the Michigan Supreme Court at 430 Mich 851 (1988); recon den, 432 Mich 911 (1989).

JURISDICTION

The opinion of the Michigan Court of Appeals was entered on June 2, 1987. Petitioners' application for leave

to appeal to the Michigan Supreme Court was denied on February 22, 1988, and their motion for reconsideration of this denial was denied on May 31, 1989. Petitioners seek to invoke this Court's jurisdiction under 28 USC § 1257(a).

STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

COUNTER-STATEMENT OF THE CASE

On October 24, 1979, Petitioner Major Boggerty was arrested by officers of the Detroit Police Department for possessing open intoxicants in a motor vehicle and for disorderly conduct. He was taken to Detroit's Eleventh Precinct where he was charged with driving under the influence of liquor. While at the police station, and under disputed factual circumstances, he injured his hip.

Petitioner's position throughout the proceedings below was that Mr. Boggerty was completely sober and was injured as a result of an attack by Detroit police officers. The only witness to the events immediately preceding Plaintiff's injury was Officer David Murray. Murray testified at his deposition that Mr. Boggerty was in a highly intoxicated state and that he tripped and fell against a large, metal trash container, pulling Murray down on top of him. Murray did not testify at trial; nor was his deposition offered in evidence.

As a result of his injuries, Petitioner Major Boggerty and his wife, Aden, commenced suit in Wayne County Circuit Court against the City of Detroit and five of its police officers, alleging negligence and 42 USC § 1983 liability: Petitioners alleged that each of the officers was guilty of negligence, assault and battery, false arrest and false imprisonment, and that the city was liable under 42 USC § 1983.

On May 20, 1983, the City filed a motion for summary judgment on the basis that Petitioners had failed to state a claim under federal law and that it was entitled to governmental immunity as to the state claims alleged. With regard to the § 1983 claim, the City argued that the Complaint failed to adequately allege a policy or custom of the City which was a direct cause of the deprivation of a constitutional right. The motion was denied by the pretrial judge and again denied when renewed on the day of trial by the trial judge.

Trial commenced on June 5, 1984. As reflected in the opinion of the Michigan Court of Appeals[1], vastly conflicting versions of the events of Petitioners arrest and subsequent injury were offered at trial.[2] According to

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[1] Petitioners' Appendix, pp. A2-A8.

[2] Petitioners' Statement of the Case ignores this conflict and ignores the implications of this conflict to the legal issues presented.

Petitioner, (1) he was completely sober at the time of his arrest and detention at the police station; and (2) he had been brutally assaulted by Officer David Murray and other unidentified police officers while held down on the floor. This story conflicted with the Respondent's version of a highly intoxicated prisoner who fell.

There was no dispute, however, that after his injury, EMS was called and would have taken Petitioner to a hospital but for Petitioner's insistance that he go to a specific hospital. EMS could not comply with this requirement and Petitioner was taken to the hospital of his choice by his wife and a friend. Hospital records noted no bruises or abrasions other than a injury to Petitioner's hip, and these records did note that Petitioner was intoxicated upon his arrival.

In support of their assertion of § 1983 liability against the City, Petitioners presented two witnesses, Eric Beckman and Frank Donley, each of whom testified that the training policy formulated by the City was a good program. Each, however, had reservations concerning the training received by the individual defendant police officers.

However, neither expert had any knowledge of the actual training received by these, or any, Detroit officers.

As reflected in Petitioners' Appendix D, pp. D1-D5, the jury, in answers to specific questions drafted by counsel for Petitioners, exonerated each of the individual police officers from any liability to Petitioners: None of the officers involved in the arrest had falsely arrested or imprisoned Petitioner. Neither of the officers involved with Petitioner at the police station had committed an assault and battery on Petitioner or assisted in any assault and battery. None of the officers was negligent in the manner in which he dealt with

Petitioner. None of the officers violated Petitioner's constitutional rights.

The jury nevertheless imposed § 1983 liability on the City, answering "yes" to the following question:

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required, so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff Major Boggerty's constitutional rights?

Judgment was entered on the jury verdict against the City of Detroit and in favor of the individual Defendant police officers. The City filed a timely motion for judgment notwithstanding the verdict arguing, among other things, of the insufficiency of the evidence to establish a custom or policy of the City which was affirmatively linked to a constitutional deprivation. The City also reiterated that Petitioners' pleadings had been likewise deficient and failed to give notice of the Petitioners' claims. That motion was denied and the City filed a claim of appeal to the Michigan Court of Appeals.

On appeal, the judgment entered against the City was reversed on the basis that Petitioners had failed to present sufficient evidence of municipal liability under 42 USC § 1983. In part, the Court stated:

> In the case *sub judice*, Plaintiffs' *own* expert testified that the training of Detroit police officers met all state standards. Plaintiffs presented no evidence that the standards their experts relied on were accepted generally by municipal departments or were of such a nature that the failure to live up to them was substan-

> tially likely to result in injury. Plaintiffs presented no evidence of similar incidents at other precinct lock-ups (footnote omitted). The City's mere failure to measure up to published training standards thought by Plaintiffs' expert to be superior to the standards of Michigan law and its failure to follow through on its own written standards does not make a prima facie case. Plaintiffs' evidence when viewed most expansively can establish no more than negligence on the City's part. Such a quantum of fault is insufficient.

(Petitioners' Appendix A16)

Petitioners sought a rehearing before the Michigan Court of Appeals, which was denied. They thereafter filed an application for leave to appeal to the Michigan Supreme Court. Respondent City filed a cross-application for leave to appeal to the Michigan Supreme Court, seeking to preserve additional grounds advanced in support of a reversal of the jury verdict. The Michigan Supreme Court denied the applications, and thereafter denied Petitioners' motion for rehearing.[3]

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE REVERSAL OF THE JURY VERDICT IN THIS CASE IS CONSISTENT WITH *CITY OF CANTON* v *HARRIS*, __ US __; 109 S. CT. 1197; 103 L ED 2D (1989).

In support of their Petition for Writ of Certiorari, Petitioners argue that the holding of the Michigan

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[3] Although not pertinent to the pending application, it may be noted that the Petitioners filed a cross-appeal to the Michigan Court

(*concluded on page 7*)

Court of Appeals is inconsistent with this Court's decision in *City of Canton* v *Harris*,__ US __; 109 S. Ct. 1197; 103 L Ed 2d 412 (1989). In fact, however, the reversal of the jury verdict imposing liability against the City of Detroit under 42 USC § 1983 is wholly consistent with *City of Canton* v *Harris, supra*. Had the Michigan courts done otherwise, Respondent would have been justified in petitioning this Court for relief.

In *City of Canton*, this Court held "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." (109 S. Ct., at 1204) However, in delineating the circumstances where such a theory would be viable, the Court rejected, as "overly broad", the rule utilized by the Sixth Circuit Court of Appeals when it reviewed the jury verdict in *City of Canton*. (109 S. Ct., at 1204) The Sixth Circuit rule rejected by this Court was stated as follows:

> On appeal, the Sixth Circuit . . . [held] that "a municipality is liable for failure to train its police force, [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." . . . The Court of Appeals also stated that an additional prerequisite of this theory of liability was that the Plaintiff must prove "that the lack of training was so reckless or grossly negligent that depriva-

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(*continued from page 6*)

of Appeals, seeking a reversal of the judgment entered in favor of the individual police officers. The grounds advanced by Petitioners did not relate to the issues relevant to the City's liability under 42 USC § 1983. The Michigan Court of Appeals affirmed the judgment entered in favor of the police officers. Petitioners' subsequent application for leave to appeal to the Michigan Supreme Court also sought further review of two issues pertaining to the individual officers. Those issues have not been pursued in the pending petition.

> tions of persons' constitutional rights were substantially certain to result." . . .

(109 S. Ct., at 1201)

As noted above, this formulation of a standard of liability was rejected by the Supreme Court as "overly broad".[4] In its stead, the Court agreed with those Circuit Courts of appeal which had adopted a "deliberate indifference" standard:

> . . . We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. (footnote omitted) . . .

(109 S. Ct., at 1204)

The Court found that this standard of municipal fault was most consistent with its prior decisions in *Monell* v *New York City Department of Social Services*, 436 US 658; 98 S. Ct. 2018; 57 L Ed 2d 611 (1978) and *Polk County* v *Dodson*, 454 US 312; 102 S. Ct. 445; 70 L Ed 2d 509 (1981), explaining further:

> . . . Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As Justice BRENNAN's

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[4] This "overly broad" standard was utilized by the Sixth Circuit in its review in *City of Canton* v *Harris*, as well as in its earlier decisions in *Hays* v *Jefferson County, Kentucky*, 668 F2d 869, 874 (6th Cir 1982), and *Rymer* v *Davis*, 754 F2d 198 (6th Cir 1984), vacated and remanded *sub nom, City of Shepherdsville, Kentucky* v *Rymer*, 473 US 901, 105 S.Ct. 3518, 87 L Ed 2d 646, reinstated, 775 F2d 756, 757 (6th Cir 1985). [See 109 S. Ct., at 1201, footnote 3.]

> opinion in *Pembauer* v *Cincinnati*, 475 US 469, 43-44, 106 S.Ct. 1292, 1300, 89 Law Ed 2d 452 (1986) (plurality) put it: "[M]unicipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. See also, *Oklahoma City* v *Tuttle*, 471 US, at 823, 105 S.Ct., at 2436 (opinion of REHNQUIST, J.) Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality — "a policy" as defined by our prior cases — can a city be liable for such a failure under § 1983.

(109 S.Ct., at 1205)

In the case at bar, the jury imposed § 1983 liability on the City of Detroit in response to a special interrogatory drafted by Petitioners. A cursory reading of that question demonstrates that, if anything, it is even broader than the "overly broad" formulation rejected by the Supreme Court in *City of Canton:*

> Do you find that the City of Detroit failed to train its police force, or trained it in a reckless or grossly negligent manner, or was deliberately indifferent to training required,so that future police misconduct was almost inevitable, or do you find that there was a policy, custom, ordinance or procedure which violated Plaintiff MAJOR BOGGERTY's constitutional rights?

(Petitioners' Appendix, p. D4)

Petitioners focus on the fact that the phrase "deliberate indifference" appears in the standard submitted to the jury, ignoring the remainder of the question. It is apparently Petitioners' position that as long as the magic words "deliberate indifference" appear, the stan-

dard will pass muster.[5] This is clearly not the case, and Respondent would simply note the use of the word "or" three times: In other words, the jury in the case at bar was allowed to impose § 1983 liability on the City if it found that the City had failed to train its police force *or* if it found that the City of Detroit had trained its police force in a reckless or grossly negligent manner *or* if it found that the City of Detroit was deliberately indifferent to the training required by its police force so that future police misconduct was almost inevitable *or* if it found that there was a policy, custom, ordinance or procedure which violated Petitioners' constitutional rights.

On the basis of this question alone, the jury verdict was properly reversed and this petition should be denied. Not only is the result reached by the Michigan Court of Appeals correct, but this case presents no questions needing clarification or resolution by this Court.

II.

REGARDLESS OF THE STANDARD APPLIED, THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO ESTABLISH EITHER A CITY POLICY OF INADEQUATE TRAINING OR AN AFFIRMATIVE LINK CONNECTING SUCH POLICY TO A RELEVANT CONSTITUTIONAL DEPRIVATION.

As stated by this Court in *City of Canton* v *Harris, supra,* the "first inquiry in any case alleging municipal

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[5] It is also noteworthy that Petitioners cite the Sixth Circuit opinion in *Rymer* v *Davis, supra,* as supportive of their position, noting at p. 31 of their brief: "It is essential to note that the jury instruction in the instant case contained every element of the *Rymer* instruction *plus* the 'deliberate indifference' language now required by *City of Canton.*" This statement alone demonstrates the Petitioners' misunderstanding of the *City of Canton* opinion. It also suffices to support both a reversal of the jury verdict in this case, as well as a denial of the pending petition.

liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation." (109 S. Ct., at 1203) The Michigan Court of Appeals correctly held that the evidence in this case was insufficient to establish either a city policy of inadequate training, or an affirmative link connecting such a policy to a constitutional deprivation. Moreover, no wrong of constitutional magnitude existed which could arguably have been linked to the alleged policy of inadequate training in the handling of intoxicated prisoners.

An understanding of three peculiarities of this case is central to an understanding of the case itself:

(a) Two inconsistent factual versions of the incident have variously been relied on by Petitioners in an attempt to sustain the jury's verdict: A sober man who is beaten by five police officers versus a drunk man who fell over a trash bin. In order to articulate the three elements necessary to § 1983 municipal liability (policy; causal connection; constitutional violation), Petitioners jump between these versions, never relying wholly on one. Neither story can support all three elements. Thus, for example, the version of an intoxicated man gives rise to a theory of inadequate training in the handling of intoxicated prisoners. However, this inadequacy cannot be affirmatively linked to an assault. If it is linked to the version of a fall, there is no arguable constitutional injury.

(b) Throughout the pre-trial, trial and post-trial proceedings, Respondent complained of the lack of specificity of Petitioners' § 1983 claim. Petitioners were repeatedly requested

to articulate the constitutional right implicated by Mr. Boggerty's injury, and the manner of its infringement. They never did so in the Courts below, and their petition to this Court is equally deficient. This deficiency continues to make discussion of the legal principles involved in this matter difficult.

(c) The jury verdict exonerated all of the police officers on all claims brought against them, including the claim for assault and battery. The Michigan Court of Appeals stated: "The special verdict makes clear that the jury premised the City's liability on the City's failure to properly train its doorman and the resultant negligent removal of Plaintiff from his cell." (Petitioners' Appendix, pp. A11-A12) In other words, the jury necessarily rejected the theory of assault.

With these factors in mind, the insufficiency of the record in this case becomes clear.

As noted by the Michigan Court of Appeals, in viewing the evidence in the light most favorable to Plaintiff, the testimony of Petitioners' experts failed to produce sufficient evidence of a policy of inadequate training.[6] As stated by this Court in *City of Canton*, 109 S. Ct., at 1205:

> Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police

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[6] The evidence was insufficient to support municipal liability pursuant to either the broader standard submitted to the jury, or the narrower standard adopted in *City of Canton*.

> officers, represents a policy for which the City is responsible. [footnote omitted] That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." . . .

Petitioners presented two experts, Frank Donley and Eric Beckman. Dr. Donley testified that the City's written program of training was good, but that it had not been effectively carried out. Dr. Beckman testified that the City's training program, and its implementation, met all state standards, although he felt that these requirements did not measure up to the standards which he believed should have been applied. The testimony of these witnesses also indicated their general lack of familiarity with the training actually received by Detroit police officers.[7]

Moreover, the source of the witness' knowledge of the training received by the Detroit police force was solely the deposition testimony of certain Defendant officers concerning their own training.[8] This is hardly sufficient to conclude that a policy of inadequate training exists, especially considering that the experts

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[7] See, for example, Dr. Beckman's testimony that he became familiar with the Detroit training procedures "[b]y keeping abreast of the field, by having conversations with police officers of various ranks, some within the Detroit Police Department, some outside the Detroit Police Department, and feedback about different levels of training that exists in different police departments." [Petitioners' Appendix, p. E15]

[8] See, e.g., Petitioners' Appendix, pp. E1, E5, E7, E11, F1, F6, F9 and F13.

had no knowledge of the actual training received by these officers or any Detroit officers.[9]

Moreover, a conclusion that particular officers were inadequately trained cannot suffice to support a finding of a "policy" of inadequate training. As explained by this Court in *City of Canton* v *Harris*, 109 S. Ct., at 1205-1206:

> In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the City, for the officer's shortcomings may have resulted from factors other than a faulty training program. [citations omitted] It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or

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[9] For example, during Dr. Beckman's testimony the following colloquy occurred:

> Q. Now listen to me, doctor: from 1970 to 1979, did the Detroit police academy that you visited once up on Cass Avenue, did it provide any training for doorman, whether Mr. Murray got it or not, did it provide training for doorman?
>
> A. I don't know.
>
> Q. You have no idea?
>
> A. I don't know.
>
> Q. Sir, how are you — you don't know if they offered any training during that period of time at all?
>
> A. For doorman, specifically?
>
> Q. Yes?
>
> A. No.
>
> [Tr VIII, pp. 138-139]

> more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the City liable.
>
> Moreover, for liability to attach in this circumstance the identified deficiency in a City's training program must be closely related to the ultimate injury. Thus, in the case at hand, Respondent must still prove that the deficiency in training actually caused the police officers indifference to her medical needs. . . .[10]

In *City of Canton*, this Court reaffirmed the principle that, in order to establish a city policy, there must be some evidence of a deliberate choice, made by a city policymaker from among various alternatives. (109 S.Ct., at 1205) In the case at bar, Petitioners did not submit proof of a single action taken by a municipal policymaker. To the contrary, the *only* evidence of any action taken by a policymaker was the promulgation of a training program which both of Petitioners' experts testified was a good program.[11] Moreover, the record

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[10] Thus, the adequacy or inadequacy of the training received by Officer Wilson and Defendant Coleman, referred to by Petitioners in support of their petition, are irrevelant to the present inquiry.

[11] Dr. Donley testified:

> Q. Do you have any opinion as to whether the City of Detroit's training program itself is improper?

(*concluded on page 16*)

contains no evidence of any other incidents or injuries allegedly caused by a policy of inadequate training.

Even if it were assumed that the record contained sufficient evidence of inadequate training, Petitioners are unable to affirmatively link this inadequacy to a relevant constitutional right. The only arguable constitutional violation depended on the Petitioners' theory of assault, a theory which was rejected by the jury. However, even had the jury accepted the existence of an assault, no affirmative link exists between a brutal assault and a policy of inadequate training in the handling of intoxicated prisoners.

The existence of a constitutional wrong is absolutely essential to the imposition of liability under 42 USC § 1983. *Baker* v *McCollan*, 443 US 137; 99 S. Ct 2689; 61 L Ed 2d 433 (1979); *Paul* v *Davis*, 424 US 693; 96 S. Ct. 1155; 47 L Ed 2d 405 (1976). *Even if* there was evidence of a city policy or custom of inadequate police training in the handling of intoxicated prisoners and *even if* such a policy of inadequate policy was affirma-

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(*continued from page 15*)

A. Improper how, as written?

Q. Yes?

A. No, I think its a well-written program.

* * *

Q. And so the academy was doing the job in presenting this program; is that true? This is the program the academy presented?

A. If everyone of the detention officers or doorman, as we are characterizing them during this trial, were trained to that program, they were adequately trained.

[Tr VII, pp. 105, 167]

Dr. Beckman testified:

Q. And can you tell me how many hours of training they give to a police officer at the Detroit police academy?

A. The number provided by the state.

Q. They meet the standards in other words?

A. Yes, sir.

[Tr VII, p. 138]

tively linked to Plaintiff's injury resulting from his removal from a cell while in an intoxicated condition, the resulting injuries did not constitute a wrong of *constitutional* magnitude. No constitutional right was implicated.

For example, if a city refused to train its officers in proper search procedures and, as a result, a plaintiff was searched without probable cause and without a search warrant, the fourth amendment guarantees against unreasonable search and seizure would be implicated and a § 1983 violation would be possible. Similarly, if a city improperly trained its officers with regard to the rights of citizens to peacefully protest and, as a result, a citizen was prohibited from lawfully protesting, the first amendment guarantees of free speech and assembly would be implicated and a § 1983 violation would be possible.

However, unless one of a person's constitutional rights is infringed as a result of the inadequate training of a police department, no § 1983 liability may be imposed. In the case at bar, no § 1983 liability could be imposed against the City of Detroit because even if the Plaintiff suffered personal injury as a result of being removed from his cell while intoxicated, no *constitutional* deprivation occurred.

In sum, there was no constitutional deprivation resulting from a city policy or custom of inadequate training in the care and custody of intoxicated persons. Conversely, there was absolutely no evidence, sufficient or otherwise, of any other municipal policy or custom.

III.

PETITIONERS' PLEADINGS FAILED TO ALLEGE A POLICY OR CUSTOM OF THE CITY OF DETROIT WHICH WAS A DIRECT CAUSE OF A CONSTITUTIONAL DEPRIVATION AND THIS CASE SHOULD HAVE BEEN DISMISSED AT THE PLEADING STAGE.

Regardless of the record created at trial, this case should have been dismissed on Respondent's motion for summary judgment. The elements missing at trial were also missing from Petitioners' Complaint.

In its motion for summary judgment, the City argued that the Complaint did not adequately allege a policy or custom of the City of Detroit which was a direct cause of the deprivation of a constitutional right. It contended that the allegations were vague, conclusory, failed to give fair notice of the specific facts and theories of misconduct directed against the City, and failed to properly allege a denial of a constitutional right caused by a governmental policy or custom. The Complaint contained no factual averments to demonstrate a city policy of inadequate training, or how any such policy caused the alleged assault and violation of a specific constitutional right. As a result of the denial of this motion, a case proceeded to trial without the Defendants knowing precisely where Plaintiff was heading, and without the Plaintiff knowing precisely where he should be heading.

Summary disposition of cases serve a worthwhile purpose in our legal system. While potentially meritorious cases should proceed to trial, complaints, which on their face, fail to state a viable claim should be dismissed before the parties and the court incur the tremendous expense of trial. Given the liberal allowance of amendments, a party who has simply neglected to

include necessary allegations, or who has misperceived the applicable legal standards, may amend his complaint and proceed to trial. On the other hand, where no viable claims exists, litigation should end. A plaintiff who has a no claim, such as in the case at bar, should not be allowed to proceed to trial.

This is especially true in § 1983 cases brought against municipalities, which are very difficult to prove. Unless plaintiffs are required to specify their complaints, these claims are, however, very easy to allege. Trials without focus result. Serious consideration of motions for summary judgment can dispose of some cases. In others, and although the motion may be denied or the plaintiff given leave to amend, the parties may be apprised of the legal standards which will govern the trial. Plaintiffs can thereafter attempt to conform their proofs to the enunciated standards and defendants will be given a proper focus for their defense.

In the case at bar, the motion for summary judgment was brought over two years after suit was commenced, at a time when Petitioners should have been able to state the specific elements and factual allegations which would support their claim. They were not able to do so, *even after the trial was over.*

Petitioners knew the legal position of the City, which had not changed since the filing of the motion for summary judgment. In presenting their case to the jury, they chose to ignore the possibility that the City's position might be correct. Their Complaint was deficient, their proofs at trial were deficient.

IV.

PETITIONERS' THEORY OF MUNICIPAL LIABILITY PRESUPPOSED THAT PETITIONER'S TESTIMONY WAS FALSE CONCERNING FACTS WITHIN HIS OWN PERSONAL KNOWLEDGE.

As discussed above, Petitioners were allowed to rely on two wholly inconsistent factual positions throughout the trial proceedings.

On the one hand, Plaintiff testified that he had had nothing to drink for the eight or nine hours preceding his arrest; that there was no basis for an arrest relating to intoxicants or disturbing the peace, and that he was assaulted and battered by David Murray and other officers. Petitioners' testimony was always consistent in this regard, and he called several witnesses in support of his version of the fact of his sobriety and assault. Petitioner never waivered. He testified that he clearly remembered the incident and testified in detail as to the events of that day, including a specific description of David Murray as the principal assailant.

On the other hand, Plaintiff's counsel argued that if the jury believed that Plaintiff was, in fact, intoxicated (thus rendering the arrest indisputably legal and impeaching Plaintiff's entire testimony), then it should find that Plaintiff's injuries were sustained because the police officers did not know how to handle intoxicated persons. (Failure to adequately train officers in the handling of intoxicated persons is relevant only if Plaintiff *was* intoxicated.) Although there was evidence of intoxication, there was no *evidence* of how Plaintiff's injuries were sustained if it was not as the result of an assault and battery on a sober plaintiff. The only testimony offered at trial with regard to the crucial incident in the lock-up room was that of Plaintiff. There was no

testimony offered by Plaintiff, or anyone else, of any negligent handling of Plaintiff which resulted in his injuries.

It was on this latter theory that liability was imposed on the City of Detroit. However, it was error to have allowed Petitioner to have advanced this hypothetical theory of liability and the jury's verdict could properly have been set aside on this basis.

As a matter of public policy, the maintenance of these wholly inconsistent theories should not have been allowed or condoned. A claimant cannot testify as to his version of the facts and turn around and ask the jury to return a verdict in his favor based on the theory which presupposes that his testimony was perjured.[12]

CONCLUSION

A writ of certiorari should not issue to review the opinion of the Michigan Court of Appeals. That opinion is wholly consistent with this Court's decision in *City of Canton* v *Harris, supra,* the case upon which Petitioners rely in support of their position that further review is necessary. Moreover, the insufficiency of the

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[12] Respondent recognizes that in many circumstances, a plaintiff is entitled to take alternative positions because he is not, himself, possessed with the true facts. Thus, it is permissible for a plaintiff to maintain different theories when he does not have possession of all the facts. Such alternate theories are also permissible when a plaintiff's perception of the facts is open to good faith error. However, in the case at bar, Petitioner was possessed of all relevant facts, and his good faith perception was not open to question. In order to succeed on his theory based on intoxication, the jury must have totally rejected Petitioners' primary theory of assault, as well as all of the facts which Petitioner had testified to. The theories proposed by Plaintiff were wholly inconsistent with each other, and the theory of intoxication, the only one submitted to the jury with regard to the City's liability, was completely at odds with Petitioners' testimony of the facts.

record to support the jury's imposition of § 1983 liability upon the City of Detroit is manifest.

Respectfully submitted,

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